No. 96-723

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1996

LUCKY STORES, INC.,

Petitioner,

vs.

RICHARD HOLIHAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to review the Ninth Circuit's decision which is based on an analysis of specific facts and is not in conflict with other circuits concerning the "regarded" issue under the American With Disabilities Act?

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STATEMENT OF FACTS

Petitioner hired Richard Holihan as a journeyman clerk on February 15, 1966. He advanced to the position of 4th clerk or night manager in 1969. In February, 1976, after a series of promotions, Lucky promoted Holihan to the position of store manager. Holihan served as a store manager for the following seventeen years at a number of stores winning numerous awards as an outstanding profit producer for Lucky. In mid-1992, Lucky conferred upon Holihan the unique distinction of being recognized as their all-time top profit producer. Lucky held Holihan in such high esteem that it chose him to be its representative at the prestigious DECA national marketing seminar held in Anaheim, California in May 1992.

In July, 1992, Mark Church, the district manager, summoned him to his office to discuss a perceived "problem." Church's resolution of the perceived problem was to transfer Holihan to a smaller store where he would have a less stressful environment. On October 22, 1992, Church again summoned Holihan to his office and informed him that he definitely had a problem. He offered Holihan three choices, the first of which (return to the store) Church immediately ruled out, and said that Holihan could take an indefinite suspension without pay, or could voluntarily accept treatment through the Employee Assistance Plan. Church took Holihan's store keys away and Holihan was forced to seek treatment through the Employee Assistance Plan ("EAP").

Holihan was treated by Dr. Strickler, Ph.D., who is retained through Lucky's EAP, and he immediately placed Holihan on a medical leave of absence. Subsequently, Lucky next selected Dr. Robert D. McDaniel, to examine Holihan. Dr. McDaniel diagnosed Holihan as suffering from "organic mental syndrome", a physical disease. From the date that Holihan was

forced to take a medical leave of absence until he was cleared to return to work by his treating physician in August 1993, Holihan was receiving medical treatment for his mental impairment.

On or about May 15, 1993, Holihan was cleared to return to work by his treating physician. He notified Lucky by certified mail on May 25, 1993 that he would be available for work on August 1, 1993. On May 28, 1993, Lucky notified Holihan that he would be terminated from his employment effective June 1, 1993. Lucky's alleged reason for termination was the fact that Holihan exceeded the six month leave time. However, Lucky did not have a written leave policy applicable to Holihan. Holihan was never aware or advised that he would be terminated if he was out on medical leave of absence for longer than six months.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S ANALYSIS UNDER THE AMERICANS WITH DISABILITY ACT IS IN HARMONY WITH THE OTHER CIRCUITS.

A. The Circuits Are Not Split.

The Petitioner alleges that there is a split among the circuits on the issue of being regarded as having a disability; however, this is not the case. There are no cases cited that show a conflict in this section of the Americans With Disabilities Act ("ADA"). The cases cited by the Petitioner all demonstrate how the particular facts of a case must be applied to the ADA to reach a decision. This does not demonstrate a conflict, because all cases are factually based. The same law is applied in all the circuits, it is only the facts of each case that are different.

Petitioner uses the following cases to demonstrate its incorrect position that there is a split among the circuits in this area of the law. Specifically, whether the courts analyzed if the perceived disability substantially limited the major life activity of "working". Petitioner alleges that the Ninth Circuit failed to examine whether Petitioner regarded Holihan as being substantially limited in his ability to work. 95-55409 Pet. App. 12. The following cases that the Petitioner relied upon demonstrates that the Ninth Circuit is in harmony with the other circuits.

1. *Runnebaum v. Nationsbank of Maryland*, 95 F. 3d 1285 (4th Cir. 1996):

In *Runnebaum,* the Fourth Circuit reviewed the facts of the case and decided that there was sufficient evidence to show that the employer perceived the employee as having an impairment that substantially limits a major activity. Specifically, the Fourth Circuit found, "Upon learning of Runnebaum's condition, a bank supervisor, Michael Brown, felt "panicky" and "uncontrolled" and believed death might be imminent for Runnebaum. This is enough to show at the summary judgment stage that the bank perceived Runnebaum as having an impairment that substantially limits a major life activity." *Runnebaum* at 1290.

Likewise, the Ninth Circuit in *Holihan* reviewed the facts of the case and found there was sufficient evidence for a jury to find that petitioner regarded Holihan as suffering from an disabling mental condition that substantially limited his ability to work. "Lucky called Holihan into two separate meetings to discuss his aberrational behavior. At one of these meetings, Lucky District Manager Church asked Holihan if he was having any "problems;" at the other, Church strongly encouraged Holihan to seek counseling through Lucky's EAP. Lucky also received several doctors' reports diagnosing Holihan with

depression, anxiety and stress, including the reports of Drs. Strickler and Cramer. From these facts, a reasonable jury could infer that Lucky regarded Holihan as suffering from a disability mental condition that substantially limited his ability to work." *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996).

2. *Daley v. Koch,* 892 F.2d 212 (2d Cir. 1989):

The Petitioners are also incorrect in its statement that the Second Circuit conflicts with this decision by the Ninth Circuit. There is no split in these decisions. In *Daley v. Koch*, the Fourth Circuit found that when there is specific criteria for a position of a police officer and the applicant fails the test and is found to have personality traits that make him unsuitable for the position of a police officer, that does not mean that the employer regarded the applicant as having a disability. *Daley* at 215-216. The facts of the *Daley* case are distinguishable from the present case. These decisions are based upon entirely different aspects of the ADA. This case does not deal with an application for a job with specific nondiscriminatory requirements that must be met prior to being offered the job.

3. *Kocsis v. Multi-Care Management,* 97 F.3d 876 (6th Cir. 1996):

In *Kocsis v. Multi-Care Management,* there are no facts submitted by the plaintiff to indicate that the employer perceived her to have a disability in being unable to care for herself or to perform all the duties of her job. The court found that plaintiff's job title and some of her duties changed, her pay and benefit remained the same as or better than those she previously received. "Moreover, Kocsis' doctors reported that she was not limited in her activity and that she, consequently, did not need any accommodations." *Kocsis* at 883, 886. The Sixth Circuit's analysis is entirely consistent with other decisions and in

particular, the Ninth Circuit's decision in this case. There is no conflict.

4. *Stewart v. County of Brown,* 86 F.3d 107 (7th Cir. 1996):

In *Stewart,* the 7th Circuit held that just because the employer concluded that the plaintiff was temperamentally unfit to serve as a sheriff's deputy, this does not amount to a showing even of a perception of a mental impairment that substantially limits one or more of the major life activities. The plaintiff stated in his deposition, "this boils down nothing more than personalities." The Seventh Circuit agreed with this conclusion. *Stewart* at 111. This issue was not addressed in the Ninth Circuit's opinion in the *Holihan* case.

B. The facts in each case are different, the decisions are different, however, analysis by each circuit is the same.

There is no split in the circuits nor do any of the decisions of the other circuits conflict with this decision of the Ninth Circuit. The courts are not divided on the issue of whether the perception of an employer is actionable under the ADA. It is a matter of applying the facts of each individual case to the law and that is exactly what each case in each circuit has done. These are factual issues, not conflicts in the application of the ADA.

The analysis under the ADA of whether the employer regarded the employee as being substantially limited in a major life activity focuses not on the employee and his actual abilities, but rather on the reactions and perceptions of the persons interacting or working with him. 2 *EEOC Compliance Manuel* § 902, at 902-3 to 902-4. The Ninth Circuit, along with the other circuits, followed this analysis in determining whether or not petitioner regarded Holihan as being substantially limited in a major life activity.

II.

THIS CASE IS INAPPROPRIATE FOR REVIEW BY THIS COURT BECAUSE IT IS STRICTLY BASED ON THE ANALYSIS OF FACTS APPLIED TO LAW.

The Americans With Disabilities Act contemplates a case-by-case determinations of whether a given impairment substantially limits a major life activity. *Runnebaum, supra* at 1290. The courts are obligated in reviewing a grant of summary judgment to view the facts in the light most favorable to the non-moving party. The Ninth Circuit reviewed the facts of this case and decided that the facts created a genuine issue of material fact as to whether petitioner regarded Holihan as disabled within the meaning of § 12102(2)(C) of the ADA. The Ninth Circuit also noted that, "on the other hand, the record also contains facts which might lead a trier of fact to conclude that Lucky did not regard Holihan as disabled." *Holihan, supra* at 366.

Because the *Holihan* case is fact bound, the Ninth Circuit's decision is only applicable to other cases with the same or similar facts.

III.

THE QUESTION PRESENTED BY THE PETITIONER RELATING TO AN EMPLOYEE'S ASSISTANCE PROGRAM WAS NOT ADDRESSED BY THE NINTH CIRCUIT'S DECISION.

The Petitioner is attempting to mischaracterize the grounds for the decision below — the grounds for the reversal of the district court decision was that the Ninth Circuit found that a reasonable jury could infer that Lucky regarded Holihan as suffering from a disabling mental condition that substantially limited his ability to work. *Holihan, supra* at 366.

The Petitioner is trying to make this case less fact bound and is attempting to characterize the Ninth Circuit's decision as resting on the broader ground of destroying an employer's ability to refer employees to its Employee Assistance Programs ("EAP") for fear of a lawsuit under the ADA.

The question presented by the Petitioner in its petition is simply not implicated in this case. This case strictly involves the application of § 12102(2)(C) of the ADA to the specific facts of this case. The petitioner is attempting to raise a general and widespread question concerning an employer's EAP, however, there is no basis for this issue. The issue of destroying the EAP throughout the nation is a red herring to distract from the real issues of this case. Holihan was referred to Petitioner's EAP because it had such a program, however, Holihan could have been referred to his personal physician under his HMO. If he had been referred to his HMO, would the issue be the same? It was the manner how the employer (petitioner) treated Holihan and forced him out of his employment, not the fact that he was referred to the company's EAP.

CONCLUSION

Holihan respectfully requests that this petition be denied because there is no conflict in the circuits and this case is fact bound.

Respectfully submitted,

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